COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203 Telephone: 720-772-2500 On Appeal from District Court for the City and County of Denver Hon. Ross B.H. Buchanan No. 2021-cv-33715	DATE FILED: November 3, 2022 1:17 PM FILING ID: 9F994BE4FBF2F CASE NUMBER: 2022CA774
Plaintiff-Appellant: CHAD BURMEISTER v. Defendants-Appellees: KYLE CLARK and TEGNA INC.	**▲COURT USE ONLY▲**
Attorney for Defendants-Appellees: Steven D. Zansberg, SBN #26634 LAW OFFICE OF STEVEN D. ZANSBERG, LLC 100 Fillmore Street, Suite 500 Denver, Colorado 80206 Telephone: (303) 385-8698 Facsimile: (720) 650-4763 steve@zansberglaw.com	Case No. 2022CA774
DEFENDANTS'-APPELLEES' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief contains 7,175 words which is in compliance with the 9,500-word limitation set forth in C.A.R. 28(g).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b). In response to each issue raised, the appellees provide under a separate heading before the discussion of the issue, a statement indicating whether they agree with appellant's statements concerning the standard of review and preservation for appeal.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s Steven D. Zansberg

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the trial court, upon viewing the record evidence in the light most favorable to the Plaintiff, properly concluded that Plaintiff did not demonstrate a reasonable probability of being able to produce *clear and convincing evidence* either that (a) the "substance" or "gist" of Defendants' publications was materially false, or (b) that Defendants made any false and defamatory statements concerning the Plaintiff with actual knowledge of their falsity or with a high degree of awareness of their probable falsity?

II. NATURE OF THE CASE

This lawsuit is precisely the type of litigation Colorado's anti-SLAPP Act was enacted to address. The Plaintiff has asserted a single claim for defamation against a news reporter/anchor, Kyle Clark, and the television station where he works. Plaintiff's claim is premised on Clark's actions in preparing, and KUSA-TV in broadcasting (and posting on the internet), an editorial rejoinder to a Colorado State Representative who falsely claimed, on January 7, 2021, that the violent, deadly assault on the United States Capitol the previous day was not the work of supporters of Donald Trump, but a so-called "false flag" operation orchestrated by Antifa. To demonstrate the factual inaccuracy of that contention, Clark showed his audience that the Plaintiff, a Colorado resident and self-avowed Trump supporter, had flown to Washington D.C. of his own volition, having

previously announced on social media that he was traveling there, to "take back our Country from the traitors," was prepared to use "our guns," because "votes don't count," and, that on January 6 he posted a photograph of himself online standing proudly next to a young man, to which Burmeister attached the caption "First guy to storm the Capital [sic] today." He also posted a photo of the exterior of the Capitol on January 6, with the caption "Traitors stand inside." Outside the Capitol, where Burmeister stood at the building's base, approximately 150 police officers sustained physical injuries.[1]

Earlier on January 7, other online commentators had identified Burmeister's Facebook posts as irrefutable evidence of his sharing the views of the Capitol rioters/insurrectionists, including his earlier publicly posted predictions that "a rebellion is brewing," "a STORM is coming," and that things in Washington D.C. that week "could get ugly," as well as his proclaiming that "Votes don't count . . . We will vote with our voices and ultimately guns." On the morning of January 7, responding to the Plaintiff's own publications, dozens took to Twitter and called for Burmeister's immediate firing by his employer, for a boycott of the company where he worked, and for his arrest and incarceration. In response to this outcry,

[1] Chris Cameron, *These Are the People Who Died in Connection With the Capitol Riot*, N.Y. Times, (Jan. 5, 2022), https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html

Burmeister changed the caption on his selfie photo above to read "Peaceful march to the capital." [sic]

Later, in the evening of January 7, 2021, Defendants first broadcast and published Clark's commentary responding to the elected official's foolish public statement. Clark showed his viewers some of Burmeister's Facebook posts to demonstrate that those who had "stormed" the Capitol (whether or not they ever entered that building), were not Antifa operatives, as the legislator had claimed, but were true believers of then-President Trump's "big lie" – that the 2020 election had been stolen. The self-described "patriots" who assembled outside, and those who unlawfully entered the building, were committed to disrupt the orderly transition of power that is the hallmark of our democracy.

Clark and KUSA-TV accurately repeated what Burmeister's online postings had said – that he had stood smiling beside the "first guy to storm to Capital [sic] today;" that he had committed to "voting with . . . our guns;" that he proclaimed "a rebellion is coming," etc. – and also accurately informed the public that Burmeister had, that morning, *before* the broadcast of KUSA-TV's report, posted a new caption to accompany his selfie photograph *and* denied that he had entered the Capitol building or had violated any laws.[2]

[2] Again, not surprisingly, many viewers of the "*Next with Kyle Clark*" broadcast and visitors to Clark's Twitter feed reacted negatively to Burmeister's public expressions of support for those who had violently attacked the nation's Capitol.

With the benefit of hindsight (and the repercussions from his own postings), Burmeister now wishes that he hadn't published those statements, voicing his support for the insurrectionists. In an effort to deny and erase his past, Burmeister has removed all of those posts from his social media accounts. And, through this lawsuit, he also seeks to punish a member of the news media for having focused further public attention on his own actions and words. Thankfully, the internet does not allow the former; the First Amendment (and Colorado's anti-SLAPP statute) do not allow the latter.

As demonstrated herein, the District Court properly dismissed Burmeister's lawsuit upon finding that he had not presented admissible evidence showing he is reasonably likely to produce "clear and convincing evidence" either of material falsity or actual malice, both of which are required for him to prevail. That well-reasoned ruling, fully supported by the evidentiary record below, should be affirmed.

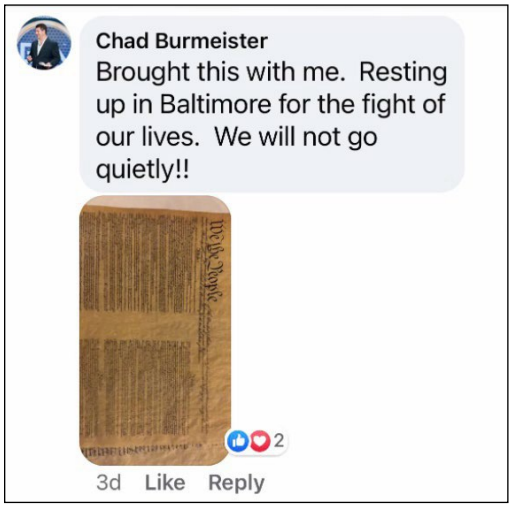
III. STATEMENT OF THE FACTS

A. Plaintiff's Actions Before and on January 6, 2021

Long before the Defendants published a word about him, Plaintiff had posted numerous statements and images on his social media accounts, which curiously are nowhere discussed in his Opening Brief (apart from the cursory reference to "his political opinions" on page 3).

Reading his Opening Brief, one might conclude (mistakenly) that the District Court had not specifically referenced those postings, and actually *reproduced* them, in its 18-page, single spaced ruling. CF pp. 197 – 214. Notably, too, those images and statements, posted by Burmeister, were also shown on screen in Defendants' broadcast and online news reports. At no point has Burmeister denied having authored and published those posts to the world.

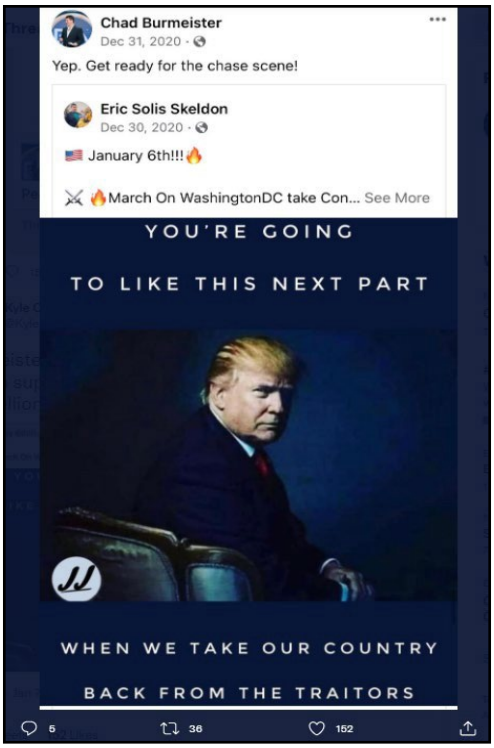
Shortly before January 6, 2021, Burmeister flew from Colorado to the greater Washington D.C. area. He posted on Facebook, the publicly accessible social media site (www.facebook.com), that he had brought a copy of the Constitution with him, and that he was "Resting up in Baltimore for the fight of our lives. We will not go quietly!!"



CF p. 66.

Followers of Burmeister's social media postings likely understood what "the fight of our lives" was referring to. Burmeister had indicated that he was in D.C. to

attend the so-called "March on Washington – Take Congress Ba[ck] . . ." scheduled for January 6, 2021. Burmeister reposted another Trump supporter's posting (festooned with crossed swords and flames), that read "YOU'RE GOING TO LIKE THIS NEXT PART . . . WHEN WE TAKE THE COUNTRY BACK FROM THE TRAITORS." CF p. 46. Burmeister commented "Yep. Get ready for the chase scene!" *Id.*



Burmeister had also previously (on December 28, 2021) proclaimed that "Rebellion is brewing," and he posted the symbol of The Three Percenters, the anti-government militia group whose slogan is "When Tyranny Becomes Law, Rebellion Becomes a Duty."

CF p. 86, 77. The Three Percenters were later determined to be among the paramilitary organizations responsible for orchestrating the violent assault on the United States Capitol.[3] Although Burmeister tendered a sworn declaration below in which he claimed he was unaware of the Three Percenters' emblem "or that there even was an entity/organization called the 'three percenters,'" CF p. 145, he appeared on the internet wearing a battle fatigue bearing that very emblem while standing on the Capitol Mall on January 5, 2021. CF p. 159.

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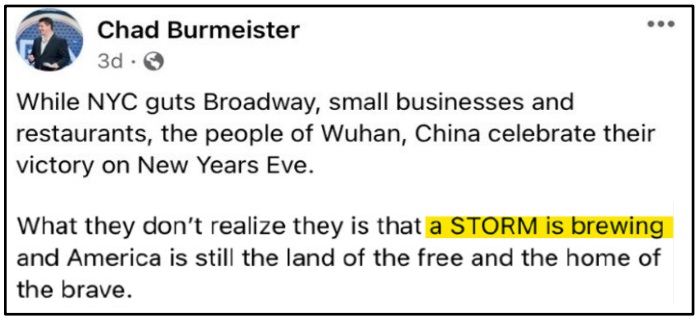
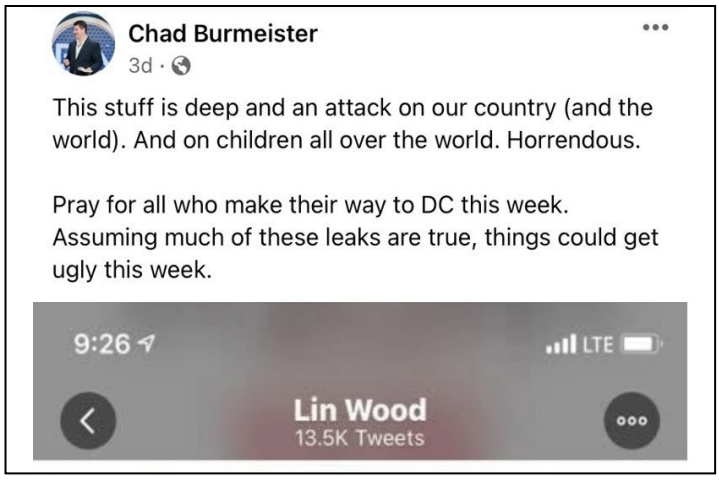
[3] Alan Feuer and Matthew Rosenberg, *6 Men Said to Be Tied to Three Percenters Movement Are Charged in Capitol Riot*, N.Y. Times (Jun. 10, 2021), https://www.nytimes.com/2021/06/10/us/politics/three-percenter-capitol-riot.html; Danielle Haynes *Texas Three Percenters Member Found Guilty for Jan. 6 Attack on Capitol*, UPI (Mar. 8, 2022), https://www.upi.com/Top_News/US/2022/03/08/Guy-Reffitt-Capitol-Riots-guilty/7301646767262/

In other previous postings, Burmeister referred to a coming "storm," the term used by anti-government radicals (including adherents of QAnon) to refer to a violent rebellion against "the enemies" of Donald Trump.[4]



CF pp. 83,84.

Also prior to January 6, 2021, Burmeister had publicly predicted that "things could get ugly this week," in the nation's Capitol.



[4] *See, e.g., Expert Decodes Trump Talk, Q Codes, and the Road to Insurrection,* Futurity (Jan. 12, 2021), https://www.futurity.org/trump-communication-supporters-2501462-2/.

CF p. 82.

On Facebook, someone named Airuk Polmare responded to one of Burmeister's postings by stating "When democracy doesn't matter anymore." Burmeister promptly set this commenter straight: "[V]otes don't count. Dead people vote. We will vote with our voices and ultimately guns."

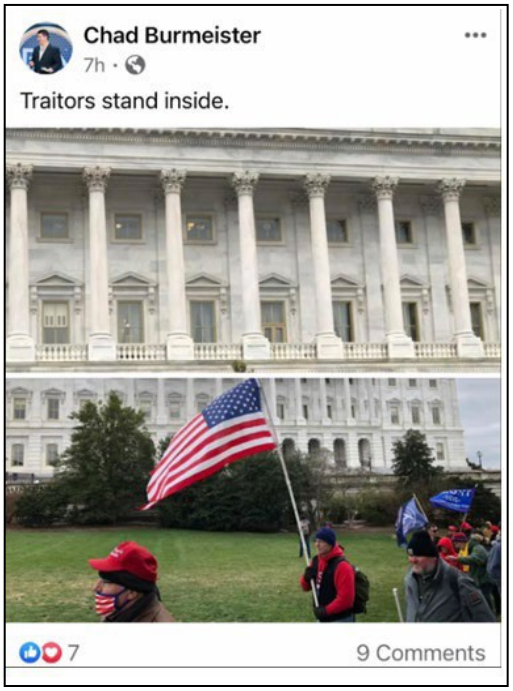
CF p. 85.

On January 6, 2021, Burmeister was among the Trump supporters who "stormed" the Capitol building[5] – posting from their midst a photo of those

[5] *See* Cambridge English Dictionary (defining "storm" as a verb meaning "to attack a place or building suddenly"). This definition plainly includes those who confronted (and some of whom assaulted) members of the Capitol Police *outside* the Capitol. Indeed, Burmeister stated that when he used the word "storm" (supposedly as a verb) in his postings, he understood it to mean "to march to the Capitol and be on the grounds." *See* CF p. 80.

Moreover, Eric Skelton, Burmeister's companion "patriot" who accompanied him to the Capitol on January 6, stated, that day, that the two of them had "stormed the Capitol . . . *not* to try to storm *inside of it*, but just to go there while they were

assembled at the foot of Congress his observation "Traitors stand inside.



CF p. 65. By this, Burmeister was apparently referring to the members of Congress and Vice President Mike Pence, who at that moment were certifying the votes submitted by the Electoral College.

At some point later in the day, on January 6, 2021, Burmeister posted on his Facebook page a photo of himself standing beside a fellow protester wearing a "Make America Great Again" cap who was holding up his index finger. Burmeister captioned the photo "First guy to storm the capital [sic] today."

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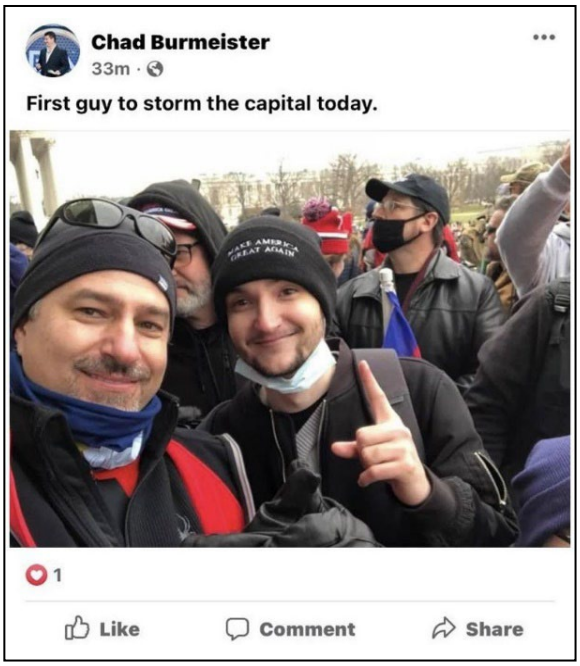
doing the votes." CF p. 164; *see* https://www.facebook.com/EricSkeldon23/videos/228921938698627 at 16:46 - 17:10.



CF p. 88.

B. Public Reaction to Plaintiff's Social Media Postings (Before Any Publication by the Defendants)

As the District Court expressly recognized in its ruling, CF pp. 197 - 214, *prior to* the Defendants' publication on the evening of January 7, 2021, numerous viewers of Burmeister's own social media postings reacted by calling for his arrest, firing, and prosecution, for having participated in "storming" the Capitol. Notably, as the District Court correctly found, all of this damage to Plaintiff's reputation occurred *before* the Defendants published a single word about Plaintiff, on the evening newscast on January 7, 2021. CF pp. 205 -207; *see also* Tr. 2/25/22 at 77:22 – 78:9.

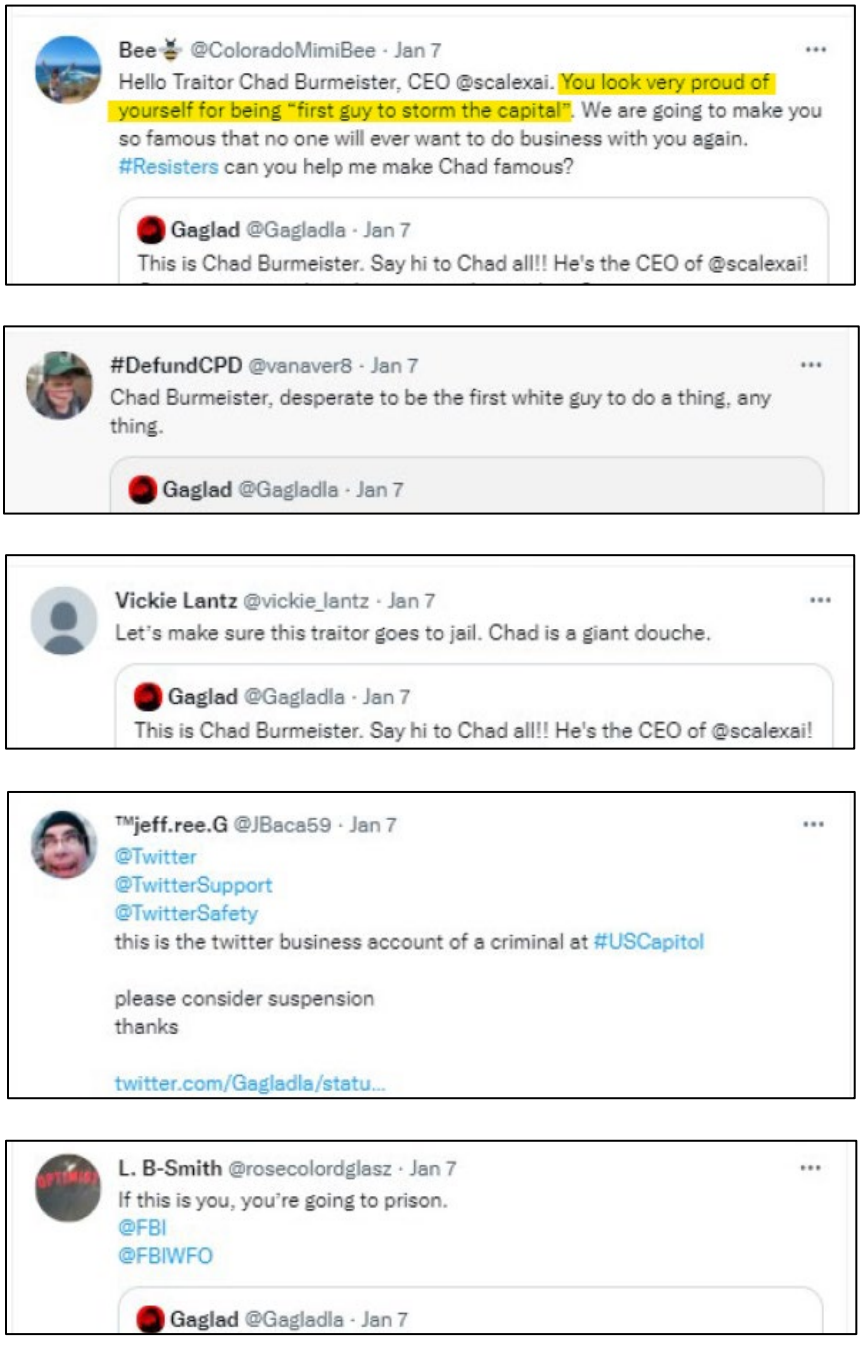
In the early morning of January 7, a number of citizens across the nation who were outraged by what they had seen unfold on live television the

prior day turned to social media to help the authorities identify the individuals who had participated in the violent attempt to overthrow our democratic system of government. At 5:27 a.m., one such individual, who uses the Twitter handle "Gaglad," began posting names and photos of those who had publicly celebrated their involvement in storming the Capitol:

Among those included on Gaglad's list (as of 11:09 a.m.) was Burmeister; Gaglad questioned doing business with Burmeister's company:

Not surprisingly, many visitors to Gaglad's Twitter feed responded with outrage, some calling for Burmeister's immediate firing,[6] others for a boycott of his company, and others for his arrest for having participated in the "insurrection." CF pp. 47 - 64. For example:

Also of note, several of the people who viewed Burmeiter's selfie, standing beside the young man holding up his index finger, understood that the ambiguous caption referred to himself, not the other person:



Once again, all of the comments above were posted *prior to* any publication by the Defendants herein. Notwithstanding that fact, Burmeister testified under oath that prior to the Defendants' publication, *later* in the evening of January 7, he "enjoyed an untarnished reputation." CF p. 144 ¶ 4.

C. A State Legislator's Social Media Posting Prompts the Defendants' Publications at Issue

On the morning of January 7, 2021, a member of Colorado's House of Representatives, Mark Baisley, posted on the internet his belief that the prior day's violent assault on the nation's Capitol was not carried out by followers of President Trump but was instead a political stunt organized by Antifa to embarrass Trump's supporters:

D. Defendants' Investigation Prior to Publishing Their News Report

Upon being alerted to Representative Baisley's posting above, KUSA-TV news anchor Kyle Clark decided he'd prepare a response to it for that evening's newscast. CF p. 70 ¶¶ 6 -7. Someone on the 9News staff had alerted Clark to

Burmeister's selfie posting on Facebook, showing himself beside a younger man, with the caption "First guy to storm the capital today." CF p. 70 ¶ 8; *id.* p. 88. Clark first confirmed that the selfie posting was actually connected to Burmeister's Facebook account (i.e., that it was authentic). *Id.* pp. 70-71 ¶ 11; *id.* p. 87. Clark also investigated the edit history of Burmeister's selfie post, and thereby confirmed that Burmeister had already changed the caption, that morning, to read "Peaceful march to the capital." *Id.* p. 70 ¶¶ 8-10; *id*. p. 89, 88.

Clark also explored Burmeister's prior social media postings about a rebellion brewing, voting with guns, etc. as set forth above, including those that mentioned the coming "STORM," which Clark recognized as a term commonly used by followers of QAnon to refer to a day of reckoning for those who do not support President Trump. *Id.* p. 71 ¶ 13.

Clark then attempted to contact Burmeister through various alternative channels, and invited him to offer his perspective for inclusion in the piece. *Id*. p. 71 -72 ¶¶ 15 -17; *id.* p. 81 (Ex. 9). Among the methods Clark utilized was to send Burmeister a text message. *Id.* p.147. In the early afternoon, Burmeister responded to Clark's text message, stating that he was on a plane and he notified Clark that he could not show the selfie photo on the air. *Id.* p. 72 ¶ 17.

At 4:57 p.m., Mountain Time, Clark received an email from Burmeister, which stated:

> Kyle:
>
> Thank you for highlighting my peaceful march to the Capitol yesterday.
>
> It was an honor to live my First Amendment.
>
> Just to clarify, "storm" for me was to march to the Capitol and be on the grounds.
>
> As I mentioned in my posts, I was there for a peaceful march, always respecting the laws of our land.

CF pp. 80, 72 ¶ 17. Five minutes later, Clark responded to that email with a series of follow-up questions for Burmeister. *Id.* pp. 73-74 ¶ 19; p. 79. Burmeister has never provided any answers to Clark's follow-up questions. *Id*. p. 73 ¶ 19.[6]

E. The Publications at Issue

On the nightly news program "*Next with Kyle Clark*" on January 7, 2021, at 6:00 p.m. Mountain Time, Clark delivered his rejoinder to Representative Baisley's tweet claiming that Antifa operatives had stormed the Capitol. The entire one minute and forty one second piece was subsequently posted on the website of KUSA- TV/9News, where it remains to this day:

[6] The first question Clark put to Burmeister was "Who was the man in the photo with you when you bragged about the first person to storm the Capitol?" CF p. 79. Nevertheless, Burmeister testified, under oath, that "Clark and Tegna made no effort to determine the identity of the 'fellow protester [in the photograph] wearing a 'Make America Great Again' cap and holding up his index finger, indicating the number one.'" CF p. 148.

https://www.9news.com/article/news/local/next/colorado-lawmaker-conspiracy-theory-antifa-capitol-trump-supporter-republican-baisley/73-d6098e31-72f4-46c8-8113-915e32d20e4a. Notably, in that report, Clark displayed and highlighted the text of Burmeister's social media postings, set forth above, showing his use of QAnon rhetoric ("STORM" and "rebellion"), his display of the Three Percenters' emblem, his statement about "voting with . . . our guns," and his prediction that "things might get ugly this week" in the nation's Capitol.

Clark did *not* state that Burmeister claimed that he "was the first to storm the Capit[o]l;" instead, he accurately stated that "Burmeister posted this photo yesterday, bragging 'First guy to storm the Capitol today.'" Clark told his audience "When I asked him about it, he said he didn't enter the Capitol, and then he said I wasn't allowed to show you this photo." Clark also accurately reported that Burmeister had, that morning (January 7), replaced the caption to the selfie photo, with "Peaceful march to the capital [sic]."

Clark then showed his audience several of Burmeiser's Facebook postings, described above, and Clark accurately described their contents. Clark ended his commentary in the studio, stating that Burmeister had recently landed in Colorado and "he emailed me to say, once again, that he doesn't believe that he broke any laws while in Washington."

In the evening of January 7, 2021, a digital content producer at KUSA-TV, Erin Powell, posted the video of *Next* broadcast piece on the 9News website, accompanied by her summary of that segment. She affixed to it the following headline and subheadline:

Clark also posted several tweets that touted the broadcast news segment and summarized his exchange of emails and texts with Burmeister. CF pp. 75-78.

IV. PROCEDURAL HISTORY AND ORDER FOR REVIEW

Plaintiff filed his Complaint, pleading a single claim for libel, premised on the broadcast report and the online posting on the 9News website. CF pp. 3-17. Defendants filed their Special Motion to Dismiss under the anti-SLAPP Act, CF pp. 90 - 114, supported by two declarations, CF pp. 44 - 46 & 69 -74, and accompanying exhibits thereto, CF pp. 46 - 68 & 75 - 89. Plaintiff filed a Response, CF pp. 115 - 141, and a declaration of the Plaintiff, CF pp. 143 - 152. Defendants filed a Reply in support of their Special Motion to Dismiss. CF pp.

153 - 169. The District Court held a hearing on Defendants' motion. Tr. 2/25/2022.

On March 28, 2022, the District Court issued is Order granting the Defendants' Special Motion to Dismiss. CF pp. 197-214. Notably, the District Court applied the appropriate standard of review: because it was uncontested that the anti-SLAPP Act applies to Plaintiff's claim, CF p. 199; Tr. 2/25/22 at 22:3-15, Plaintiff was required to demonstrate a reasonable probability of producing clear and convincing evidence of both (a) material falsity, and (b) actual malice. CF pp. 199 – 201. Upon reviewing the declarations both parties had filed, and the accompanying exhibits, the District Court properly concluded that Plaintiff had not met his burden. *Id.* pp. 205-214.

V. SUMMARY OF THE ARGUMENT

The District Court did not err in resolving the Defendants' Special Motion to Dismiss the Plaintiff's libel claim. Without weighing the evidence presented by the parties, the District Court correctly found, as a matter of law, that Plaintiff had failed to meet his burden under the second prong of the anti-SLAPP Act to demonstrate a "reasonable likelihood" that he could satisfy all of the necessary elements to make out a successful claim for libel. Specifically, the District Court properly found that Plaintiff had not shown a reasonable likelihood that he could present clear and convincing evidence (a) of material falsity – in light of his own

social media postings and admission that he had "stormed" the Capitol, in the manner in which he defined that term, or (b) that Defendants had published with actual knowledge of falsity or with a "high degree of awareness of probable falsity." Accordingly, the District Court's well-reasoned ruling should be affirmed.

VI. ARGUMENT

A. PLAINTIFF'S BURDEN UNDER THE ANTI-SLAPP ACT

This Court has issued two recent rulings applying Colorado's anti-SLAPP Act. *See L.S.S. v. S.A.P.*, 2022 COA 123; *Salazar v. Public Trust Institute*, 2022 COA 109M. Because Plaintiff concedes that his claims are subject to the anti-SLAPP statute, CF pp. 199, Tr. 2/25/2022 at 22:3 - 15, the only issue presented by this appeal is whether the District Court erred in finding that Plaintiff had not met his burden of proof, under the second prong of the statute, to establish (through the presentation of admissible evidence) that he had a "reasonable likelihood" of prevailing on his claims. *L.S.S.*, 2022 COA 123 ¶ 22.

Because Burmeister's defamation claim is premised on two publications that addressed matters of legitimate public interest, to prevail on his claim, both the Colorado and federal Constitutions require him to establish, by "clear and convincing evidence," *both* (a) the *material* falsity (or lack of "substantial truth")

of the allegedly defamatory language at issue,[7] *and* (b) that Defendants published with "actual malice." *L.S.S.,* 2022 COA 123 ¶¶ 36, 39, 41.

The "clear and convincing" burden on these two issues must be applied to determine whether Plaintiff satisfied the "minimal merit" standard under the anti-SLAPP Act. *See L.S.S.,* 2022 COA 123 ¶¶ 41 - 43; *accord Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1166 (2004) ("Courts must take into consideration the applicable burden of proof in determining whether the plaintiff has established a probability of prevailing."); *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 274 (2001) ("in addressing . . . whether plaintiff has demonstrated the existence of a *prima facie* case, [the Court] must bear in mind the higher clear and convincing standard of proof") (internal quotation marks and citation omitted); *Hoang v. Tran*, 60 Cal. App. 5th 513, 537 (2021) (same).

[*remainder of this page left intentionally blank*]

[7] *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986); CJI-Civ. 4th Ch. 22, Introductory Note ¶ 6 & Instr. 22:1 Notes on Use ¶ 12 (2022); *Lockett v. Garrett*, 1 P.3d 206, 210 (Colo. App. 1999); *Smiley's Too, Inc. v. Denver Post. Corp.*, 935 P.2d 39, 41 (Colo. App. 1996).

B. THE DISTRICT COURT'S ORDER CORRECTLY FOUND THAT PLAINTIFF DID NOT DEMONSTRATE A REASONABLE PROBABILITY THAT HE WILL BE ABLE TO PRODUCE CLEAR AND CONVINCING EVIDENCE THAT THE "SUBSTANCE" OR "GIST" OF DEFENDANTS' CHALLENGED PUBLICATIONS WAS MATERIALLY FALSE.

1. Standard of Review & 2. Preservation of the Issues

Defendants agree that this Court reviews *de novo* all legal issues presented in this appeal and that Plaintiff preserved this issue below.

3. The Burden of Proving Material Falsity Requires Demonstration That the "Substance" or "Gist" of the Challenged Publication is False

To establish the requisite *material* falsity, a plaintiff must show that the "substance [or] the gist" of the publication, as a whole, is inaccurate. *Gomba v. McLaughlin*, 504 P.2d 337, 339 (Colo. 1972). "The fact that a statement may have contained some false information does not necessarily make the substance or gist of the statement itself false." C.J.I.-Civ. 22:13 (2022). An inaccuracy that does not move the "sting" of the alleged defamation materially beyond the literal truth is to be ignored, as a matter of law. *Bustos v. A&E Television Networks*, 646 F.3d 762, 764 (10th Cir. 2011) ("Under Colorado law, . . . the plaintiff must show that the challenged defamatory statement is not just false but *material*." (emphasis added)). "To qualify as *material* the alleged misstatement must be likely to cause reasonable people to think '*significantly* less favorably' about the plaintiff than they would if they knew the truth; a misstatement is *not actionable* if the

comparative harm to the plaintiff's reputation is *real* but *only modest*." *Id*. at 765 (emphasis added) (citation omitted). This standard is well entrenched in Colorado law. *See*, *e.g.*, C.J.I.-Civ. 22:13 (2022) (same); *Barnett v. Denver Publ'g Co., Inc.,* 36 P.3d 145, 147 (Colo. App. 2001).

In each of the foregoing cases and those that follow, the issue of the materiality of allegedly false statements was treated as a question of law. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc*., 861 F.3d 1081 (10th Cir. 2017) (applying Colorado law) (affirming trial court's grant of motion to dismiss defamation claim on grounds of substantial truth)); *Fry v. Lee*, 2013 COA 100, ¶¶ 23-25, 29, 49-58 (Colo. App. 2013) (same); *Barnett*, 36 P.3d at 147-48 (same, on summary judgment).

4. The District Court Did Not Err When It Found That Plaintiff Failed to Defeat Defendants' Anti-SLAPP Motion by Presenting Clear and Convincing Evidence of Material Falsity

This Court need only review the District Court's thoughtful and well-reasoned Order to conclude it contains no error of law. CF pp. 236 – 253.

Notably, Plaintiff identified only four statements in the Defendants' publications that he alleged were materially false and defamatory:

1. Plaintiff "claimed to storm the [Capitol] building" on January 6, 2021;
2. Through his posts on Facebook, Plaintiff was "boasting about what was happening" at the Capitol on January 6, 2021;

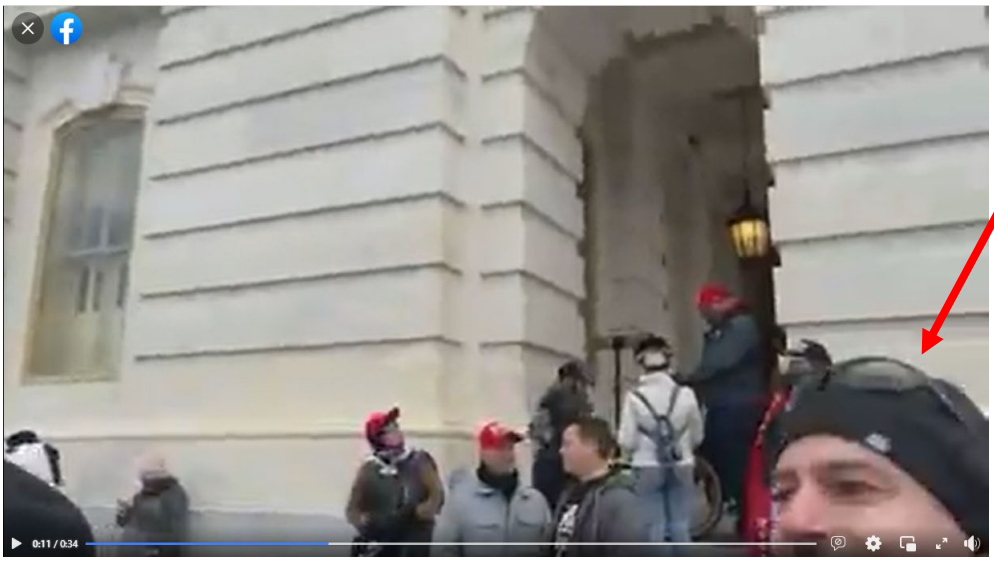
3. Plaintiff was seen online, "bragging, first guy to storm the capital [sic] today;" and

4. Plaintiff's "Facebook page is full of QAnon conspiracies about 'the storm,'" which is "the moment QAnon believers think that President Trump is going to round up and execute his opponents."

CF 240; *see also* Tr. 2/25/2022 at 40:15 – 40:11; 45:12 -13.

With respect to statement number one, above, it is undisputed that Plaintiff posted the photo of himself standing, smiling, beside the young man who was holding up his index finger, signaling "1st", at the rally outside the Capitol and affixed to it the highly ambiguous caption "First guy to storm the Capital today." Furthermore, in his email exchange with Defendant Clark, Burmeister explained that when he used the term "storm" (as a verb in his photo caption), he meant it to mean "to march to the Capitol and be on the grounds." CF p. 80. Indeed, these are the very words that Burmeister's traveling companion, Eric Skeldon, uttered, as he and Burmeister walked beside one another from Capitol, following the violent protest there: "***we stormed the Capitol*** . . . *not* to try to storm *inside of it*, but just to go there while they were doing the votes." CF p. 164; *see supra* at 9-10 n. 5. Combined with the fact that Defendants' reports, both as broadcast and online, repeatedly stated that *Burmeister had not entered the Capitol* (and had not broken any laws), the only reasonable interpretation a viewer of *the publications as a*

whole[8] could conclude is that Burmeister had "stormed" the Capitol in the manner he intended it – "to march to the Capitol and be on the grounds." And, Burmeister admits that he did, in fact, march to the base of the Capitol and was present on its grounds (behind the police barricades) while the rioting was occurring there. *See, e.g.,* http://www.facebook.com/EricSkeldon23/videos/228990915358396 at 0:11



Accordingly, the District Court did not err when it concluded that the first statement was not shown, by clear and convincing evidence, to be materially false:

> [T]here is no suggestion that Defendants' statements were based on undisclosed sources of information. Rather, viewers were merely made aware of the substance of Plaintiff's posts, including a deleted caption that he altered after-the-fact, which Plaintiff does not dispute he authored and publicly posted. . . . Accordingly, the court finds that any defamatory implications

[8] *See Smiley's Too, Inc. v. Denver Post Corp.,* 935 P.2d 39 (Colo. App. 1996) (holding that the test for falsity requires a finding that "*the article as a whole* would produce a materially more damaging effect upon the reader than the truth of the matter."); C.J.I. Civ. 22:11 (2022).

> stemming from the statement that he "claimed to storm the [Capitol] building" were necessarily lessened by Defendants' inclusion of Plaintiff's Facebook posts, both before and after editing, along with his statements clarifying [his] intended meaning of such posts.

CF p. 205.

With respect to the Second and Third challenged statements, by which Defendants accused Burmeister of "bragging" and "boasting" about the events at the Capitol on January 6, there can be no serious argument that Burmeister's selfie photo and the original caption (as well as his second caption, also posted before Defendants' broadcast) both appeared, on their face, to show Burmeister being pleased and/or proud to be on the scene of the "Stop the Steal" rally and march to the Capitol, and apparently embracing the views espoused by the fellow standing beside him the photo, not rejecting or shunning him as a law-breaking insurrectionist. The fact that so many viewers of Burmeister's own posting of his selfie had responded to it with outrage and calls for his firing, prosecution, and incarceration, *see supra* at 13-14, strongly supports the District Court's conclusion:

> [R]egardless of what Plaintiff intended to communicate regarding his participation in the events of January 6, *ordinary members of the public interpreted his post to mean that he was proudly the first to storm the Capitol building*. . . .
>
> [E]ven before the subject broadcast, members of the public understood Plaintiff's Facebook posting and caption to describe a level of involvement in the January 6th events, which they opined warranted termination of his employment and potentially his arrest. *Id*. The public also expressed

> concern with Plaintiff's demeanor in the photo he posted, demonstrating *they understood the post to express a sense of pride related to Plaintiff's participation in events at the Capitol*. . . . The fact that Plaintiff later changed the caption of his Facebook posting to "[p]eaceful march to the capital," and responded to Mr. Clark's inquiry by stating "[j]ust to clarify, 'storm' for me was to march to the Capital and be on the grounds" would seem to indicate that *Plaintiff himself recognized that his original posting was somewhat less than optimally clear regarding what he contends his level of involvement was*, and had already been interpreted in a somewhat negative light by the public prior to Defendants' broadcast. . . .
>
> Thus, the court finds it is clear that any reputational damage incurred by Plaintiff was primarily caused by his own decision to publicly post a photograph and caption which average members of the public understood indicated that he was proud of either being, or being with, the "[f]irst guy to storm the capital [sic] today." *In fact, the [defendants'] publications' use of Plaintiff's verbatim quotations in which he clarified that he did not enter the Capitol may even have mitigated the defamatory implications of his own Facebook post*, since prior to the publication of the broadcast and article, at least some average readers apparently understood Plaintiff to be proudly asserting that he himself was the first to enter the building.
>
> Accordingly, the court finds that Defendants statements that Plaintiff "claimed" to have stormed the Capitol building, or that Plaintiff "bragged" or "boasted" about his involvement in the January 6th events, in the context of the entire story and as understood by the average viewer, were not materially false.

CF pp. 206 - 207 (emphasis added).

Lastly, Defendants' statements saying Burmeister's Facebook page was "full of QAnon conspiracy theories about 'the storm'" and that "[h]is page also includes posts about QAnon conspiracies and anti-government militia," are, without

question, a true and accurate statement, as reflected by Burmeisters' postings copied above that Defendants displayed to their audience. Although Burmeister feigns ignorance and pretends that he used the word "STORM" in all caps text and as a noun (not, to "storm" the Capitol) unaware of its specialized meaning among QAnon followers,[9] it is undisputed that that word did appear, at least twice, on his Facebook page (before he deleted all those postings; so it is unknown how many *other* such references were displayed there). Thus, again, the District Court did not err when it concluded

> Because Plaintiff's Facebook page includes many examples of posts that could be rationally interpreted as referring to QAnon theories . . . if the court were to conclude that the "gist" of the comment was false, the court finds that any inaccuracy was immaterial. *See, e.g., Time Inc. v. Pape*, 401 U.S. 279, 290, (1971) (holding no jury issue was presented where news organization "adopt[ed] . . . one of a number of possible rational interpretations of a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*"). Thus, the court concludes as a matter of law that no reasonable juror could determine that Defendants' alleged defamatory statement that Plaintiff's Facebook was "full of" posts referencing QAnon was anything

[9] *See* CF p. 145 (Burmeister claiming such ignorance, as he did with the emblem of the Three Percenters he displayed on his chest on January 5, 2021, while standing on the Capitol Mall). In one of his online postings, CF p. 82, Burmeister responded to Lin Wood, who was then a prominent adherent and promulgator of QAnon conspiracy theories. *See* Anders Anglesey, *QAnon Followers Turn on Kyle Rittenhouse After He Calls Lin Wood 'Insane',* Newsweek (Nov. 24, 2021), https://www.newsweek.com/qanon-followers-turn-kyle-rittenhouse-after-calls-lin-wood-insane-1652816 .

> less than a rational interpretation of the substance of Plaintiff's Facebook posts.
>
> Accordingly, the court finds that Plaintiff has failed to demonstrate that the statement that his Facebook page was "full of" QAnon conspiracy theories was materially false, let alone done so clearly and convincingly

CF p. 207 - 211.

C. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFF DID NOT DEMONSTRATE A REASONABLE PROBABILITY THAT HE WILL BE ABLE TO PRODUCE *CLEAR AND CONVINCING* EVIDENCE THAT DEFENDANTS PUBLISHED WITH ACTUAL MALICE

1. Standard of Review & 2. Preservation of the Issues

Defendants agree that this Court reviews *de novo* all legal issues presented in this appeal and that Plaintiff preserved this issue below.

3. The District Court Did Not Err in Concluding That Plaintiff Had Failed to Meet His Burden of Demonstrating He Has a Reasonable Likelihood of Producing Clear and Convincing Evidence of Actual Malice

Plaintiff mistakenly argues that the District Court erred by failing to recognize, as he claims, that Defendants published their news reports "recklessly" because Defendants allegedly did not consider the "affect [sic] of their broadcast on the Plaintiff's well-being." Op. Br. at 29; *id.* at 12. Quite plainly, Plaintiff does not understand what constitutional "actual malice" – as opposed to ordinary common law "malice" – means. *See, e.g., Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10 (1970) (absent knowledge or reckless disregard *of falsity*,

actual malice is not established *even if it is shown* that defendant published challenged statements out of "spite, hostility, *or deliberate intention to harm*") (emphasis added); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (First Amendment forbids "a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood"); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63 (1966) ("[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."). Actual malice focuses exclusively on the defendant's subjective state of mind *with respect to truth or falsity* at the time of publication. *See, e.g.*, C.J.I. Civ. 22:3 (2022) (defining "reckless disregard of the truth" as "at the time of publication, the person publishing it believes that the statement is probably false or has serious doubts as to its truth"); *see also Pierce v. St. Vrain Valley Sch. Dist.,* 944 P.2d 646, 652 (Colo. App. 1997) (actual malice is not established even where defendant "should have had serious doubts" about the truth), *rev'd in part on other grounds*, 981 P.2d 600 (Colo. 1999).

The District Court properly found, as a matter of law, that Plaintiff had not met his burden of proving he had a reasonable likelihood of presenting clear and convincing evidence that Defendants published any false and defamatory statement about him with actual malice. The only evidence regarding any Defendant's actual state of mind regarding the truth of statements at the time of publication was the

sworn declaration of Kyle Clark, the gist of which is set forth above. CF pp. 70 - 74. In it, Clark explained in detail the process by which he decided to respond, on air, to Representative Mark Baisley's tweet, the steps he took to confirm the authenticity of Burmeister's social media postings, to document the editing history of Burmeister's caption for his selfie celebrating "First guy to storm the capital today," and Clark's extensive efforts to contact Burmeister and have him respond to numerous questions about the content of his incendiary social media posts. *Id.* As the District Court correctly noted, "Plaintiff did not respond to Mr. Clark's further inquiries [including identifying the person standing beside him in the selfie photo] . . . . [I]t was at least in part Plaintiff's failure to cooperate with Defendants' investigation that prevented them from discovering further evidence, the absence of which forms the basis of Plaintiff's argument that Defendants' investigation was inadequate." CF pp. 211-212.

There can be no serious contention that Clark's actions in researching his news report on January 7, 2021 were lacking in rigor. His investigation certainly cannot accurately be described as "grossly inadequate." *id.* at 212 ("the court cannot conclude that Defendants' investigation was so inadequate as to amount to actual malice . . ."). *But see* Op. Br. at 33; *id.* at 31-32 (stating, with no citation to any record evidence, that TEGNA "knowingly abandoned its own journalistic standards and integrity in broadcasting and principles of ethical journalism").

Burmeister opted not to conduct any discovery into the Defendants' reporting process or regarding their state of mind at the time they published, as he could have sought to do under the anti-SLAPP statute. CF p. 251 - 252; Tr. 2/25/21 48:12 – 49:3; 54:25 – 59:20. Therefore, as the District Court correctly concluded, "Plaintiff has done nothing to rebut [Clark's sworn testimony] by way of sustaining his burden of demonstrating a reasonable likelihood of being able to prove actual malice by clear and convincing evidence." CF p. 252.

Having failed to present any admissible evidence relevant to the Defendants' actual subjective belief as to the truth of their reports at the time of publication, Burmeister now argues that "an accumulation of facts and evidence" extraneous to that thought process somehow satisfies his burden of demonstrating a reasonable probability he can produce "clear and convincing evidence" of actual malice. Op. Br. at 26. Again, with no citation to any actual record evidence, Burmeister asserts that four alleged "facts" – (1) the purportedly inherent improbability of the statements at issue, (2) his mere allegation that Defendants "fabricated facts and falsely attributed statements to [him]," (3) Defendants' purported "motive to lie" – by seeking to debunk Representative Mark Baisley's tweet, and (4) Defendants' alleged "harbor[ing of] ill-will towards Burmeister . . . and other Trump

supporters"[10] – cumulatively add up to "clear and convincing evidence" of actual malice. Op. Br. at 26-34.

To provide a point-by-point rebuttal to this strained argument is to give it far greater respect than it is due. Nevertheless: (1) it was not "inherently improbable" to report Burmeister's own words, in his two selfie captions, while including his explanation that he used "storm" in the photo caption to mean "to march to the Capitol and be on the grounds" and also to report Burmeister's statement that he did not enter the Capitol; (2) Defendants did not "fabricate" that Burmeister had posted the selfie with his own ambiguous caption which had prompted viewers (*before* Defendants' broadcast) to surmise the caption referred to himself, or to say Burmeister *claimed* he "stormed" the Capitol, when those are the exact words his companion, Eric Skeldon, used to describe their actions that day; (3) that Defendants wanted to fact-check Rep. Baisley's claim that Antifa, not Trump supporters, had marched to the Capitol, rioted (both outside and inside) and sought to prevent the counting of the electoral college votes, was no motivation for them *to lie* by accurately stating that Burmeister was, by his own admission, among those Trump supporters (while making clear he did not enter the Capitol); and (4)

[10] *But see Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 10 (1970) (holding that defendant's "spite, hostility or deliberate intention to harm" the plaintiff does not constitute "actual malice"); *Lewis v. McGraw-Hill Broad. Co.,* 832 P.2d 1118 (Colo. App. 1992) (same).

there is no evidence in the record, whatsoever, that Defendants harbored ill-will toward Burmeister, individually, or toward any other Trump supporters; Clark's sworn declaration establishes he sought to demonstrate *the factual inaccuracy* of Rep. Baisley's erroneous claim that the insurrection at the Capitol on January 6, 2021 was the work of Antifa, rather than followers/supporters of President Trump. CF p. 70 ¶¶ 6 -7. His motivation was, quite simply, to uncover and report the truth, as is true of all ethical journalists.

In sum, Burmeister did not produce even a scintilla of admissible evidence concerning the Defendants' actual subjective state of mind at the time they published the challenged reports; Clark's sworn declaration, which *did* address that dispositive question, remains completely undisputed. None of the extraneous alleged "facts" that Burmeister has raised in his Opening Brief withstand even the most cursory level of scrutiny. The District Court did not err in concluding, as a matter of law,[11] that Plaintiff had not met his burden of demonstrating a reasonable probability that he can produce "clear and convincing evidence" that Defendants either knew their statements about him were false or that they actually harbored

[11] Although Burmeister argues that the District Court erroneously decided various factual issues that should be left to the jury, it is firmly established that "[w]hether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Lockett v. Garrett*, 1 P.3d 206, 210 (Colo. App. 1999) (*citing Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990)).

serious doubts as to their truth. *DiLeo v. Koltnow*, 613 P.2d 318, 321 n.4 (Colo. 1980); *see also Conroy v. Spitzer*, 70 Cal. App. 4th 1446, 1454 (1999) (affirming trial court's grant of anti-SLAPP motion: "Conroy was required to show a likelihood that he could produce clear and convincing evidence that Spitzer's statements were made with actual malice. However, as Spitzer's statements were . . . based on reliable evidence . . . Conroy failed to establish a probability of prevailing on his defamation claim." (citation and internal quotation marks omitted)).[12]

VII. CONCLUSION

For the forgoing reasons, the judgement of the District Court should be affirmed.

[12] *See, also Young v. CBS Broad., Inc.,* 212 Cal. App. 4th 551(2012) (affirming grant of anti-SLAPP motion premised on finding plaintiff had not adequately demonstrated actual malice); *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 92 (2007) (same); *Ampex Corp. v. Cargle,* 128 Cal. App. 4th 1569, 1579 (2005) (same); *Robertson v. Rodriguez,* 36 Cal. App. 4th 347, 360 (1995) (same).

REQUEST FOR AWARD OF ATTORNEY FEES ON APPEAL

Pursuant to Colorado Appellate Rule 28(a)(9) and § 13-20-1101(4)(a), C.R.S., the Defendants-Appellees request this Court to award them their attorneys' fees reasonably incurred in prosecuting this appeal and remand to the District Court for determination of reasonable time and hourly rates. *See Evans v. Unkow,* 45 Cal. Rptr. 2d 624, 630 (1995) (construing identical provision of the California anti-SLAPP law to mandate award for fees incurred in a successful appeal by the anti-SLAPP movant); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman,* 47 Cal. App. 4th 777, 785 (1996) (same).

Dated: November 3, 2022

Respectfully submitted,

By */s Steven D. Zansberg*
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TEGNA Inc. and Kyle Clark

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2022, I caused this Answer Brief to be served on all counsel of record via the ICCES e-filing system.

/s Steven D. Zansberg